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No. 89-2029

Supreme Court, U.S.

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In The
Supreme Court of the United States

October Term, 1989

SHELL OIL COMPANY,

Petitioner,

v.

RAYMOND J. LEONARDINI,

Respondent.

On Petition For A Writ Of Certiorari To The
Court Of Appeal Of The State Of California
Third Appellate District

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Whilst conceding that the judgment below penalizes Shell for the sole act of filing a complaint in a federal court (Br.Opp. 19-20) – which squarely raises the constitutional questions set out in the petition – the brief in opposition raises some objections that necessitate a reply under Rule 15.6 These objections are readily exposed as superficial.¹

1. Under long settled principles, a federal constitutional question is properly presented for review by this Court if it is presented at the time and in the manner required by the law of the state from whose courts the question arises. *E.g., Edelman v. California*, 344 U.S. 357, 358 (1953). The brief in opposition submits that because no opinion of any California court treats or decides the precise constitutional questions in Shell's petition, Shell must have failed to present them properly. (Br.Op. 11-19). But no such rule could apply when a state's judicial

¹ One of these will be so obvious to those accustomed to the practice of this Court as hardly to need mention. Respondent actually urges that certiorari should be denied because the petition does not contain a separate topic heading preceding the discussion as to how the constitutional questions were presented below. (Br.Opp. 11.) This objection has no substance. Shell's counsel solicited and got advice from the Clerk's office that the form it used was allowable. This advice was confirmed by a letter addressed to the Deputy Clerk who furnished the advice.

system requires presentation of a point of federal law to a court with discretionary reviewing power. Otherwise, a state court would effectively become the final arbiter of federal issues simply by declining to review or comment on those issues.

2. Under California's rigid view of *stare decisis*, a lower court "faced with higher authority" has the duty "of saluting and following orders." *Vaerst v. Tanzman*, ___ Cal.App.3d ___, 90 Cal. Daily Op. Svc. 6179, 6181 (Aug. 21, 1990; Poche, J., dissenting). The *Farajpour* case cited in the petition (p.17; now officially reported at 221 Cal.App.3d 19, 270 Cal.Rptr. 356) shows that it is not only idle, but it is improper, to ask a California Superior Court or Court of Appeal to join an emerging trend in the law, where to do so would require reexamination of State Supreme Court precedent. On such questions the Supreme Court of California is the proper court of first instance. To present such questions – as our petition does – to lower California courts would be, in Dean Wigmore's phrase, a violation of the canons of sober behavior.

Shell made the presentation required by California law when it petitioned the California Supreme Court, raised the questions now tendered for certiorari, and garnered three votes for an unrestricted review (of four required).

3. Respondent's comments about Shell's proposed jury instructions (Br.Opp. i, Question 3, and pp. 28-29), are fully answered by the last two points. Litigants in California Superior Courts are required to submit jury instructions. To fulfill this requirement cannot be a waiver of a federal constitutional right when, at the time

the instructions must be tendered, the court receiving them would "violate jurisdictional bounds"² by entertaining the position advocated in the proposed instructions. California does not require "pointless" presentation of a contention. *Moradi-Shalal v. Fireman's Fund Ins. Co.*, 46 Cal.3d 287, 292 n.1, 758 P.2d 58, 250 Cal.Rptr. 116 (1988).

Respondent misstates the record on the subject of the jury instructions proposed by Shell. Shell proposed a preponderance of the evidence standard of proof. That instruction, reprinted following this brief at Reply App. 1a,³ does not propose that punitive damages be made subject to the preponderance standard. *See also* CT 555. The instruction which made punitive damages subject to a preponderance standard of proof is captioned as one of plaintiff's proposed instructions. Reply App. 3a. In California, Code of Civil Procedure §647 provides:

"All of the following matters are deemed excepted to: the verdict of the jury; . . . an order or decision from which an appeal may be taken; . . . giving an instruction, refusing to give an instruction, or modifying an instruction requested. . . ."

4. There is no conceivable rule of California substantive law which could be an adequate ground to allow California to penalize Shell in a way inconsistent with the First Amendment right of petition or the Fourteenth Amendment. *Compare* Br.Opp. 18-19. While California

² *Farajpour*, 221 Cal.App.3d at 40, citing *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450 (1962).

³ The Reply Appendix citations are to the Appendices to this brief.

could furnish greater protection of these rights it could not furnish less. Shell's compliance with California procedural law has already been demonstrated.

5. The questions Shell presents are not to be confused with the issues and remedies subsumed within those questions. A higher burden of proof may be one way to remedy constitutional deficiencies inherent in the imposition of punitive damages. So it was in *Gertz*.⁴ But before the Court ever gets to remedying constitutional error it must find and declare it. Shell presented to the California Supreme Court the same claims of constitutional error under the First and Fourteenth Amendments now presented to this Court. Respondent makes no contrary contention. *Compare* Br.Opp. 28-29.

6. Respondent dwells on the jury's finding in this case that Shell acted with actual malice. Br.Op. 21. Such a finding was essential for the cause of action for malicious prosecution. It was based on a preponderance of the evidence standard of proof. Reply App. 3a.

This finding does not foreclose this Court's review. As a case concerning issues of alleged "public concern," culminating in Shell's exercise of the First Amendment right to petition, Shell contends that the punitive damage assessment impermissibly penalizes it for the exercise of its right. A preponderance of the evidence finding of malice does not detract from Shell's constitutional submission under the First and Fourteenth Amendments. Further, this Court would necessarily conduct a plenary

⁴ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

review of any jury finding of malice. *E.g., Bose Corp. v. Consumer Union of U.S., Inc.*, 466 U.S. 485 (1984). Here the proof of malice was insufficient to satisfy constitutional standards. Under the trial court's instructions, the jury was allowed to infer Shell's actual malice from the trial court's directed verdict that Shell lacked probable cause to file its action in federal court. *See* Pet. 10, 21. The directed verdict was based upon the supposed legal insufficiency of Shell's prayer in its federal complaint. App. 30a-32a.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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REPLY APPENDIX
BURDEN OF PROOF AND PREPONDERANCE
OF EVIDENCE

In this action, the plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues:

- (1) That the defendant initiated or took an active part in the commencement of a civil proceeding against the plaintiff;
- (2) That the civil proceeding against the plaintiff terminated in plaintiff's favor in a manner reflecting on the merits of the case;
- (3) That the defendant had no probable cause in commencing the civil proceeding;
- (4) That defendant acted with malice in commencing the civil proceeding;
- (5) That plaintiff suffered actual injury as a result of the commencement of the civil proceeding.

By a preponderance of the evidence is meant such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue preponderates, then your finding upon that issue must be against the party who had the burden of proving it.

In determining whether an issue has been proved by a preponderance of the evidence, you should consider all

2a

of the evidence bearing upon that issue regardless of who produced it.

BAJI 2.60

GIVEN: _____

REFUSED: ☒ _____

MODIFIED: _____

PLAINTIFF'S INSTRUCTION NO. ____
BURDEN OF PROOF AND
PREPONDERANCE OF EVIDENCE

The plaintiff has the burden of proving by a preponderance of the evidence all of the facts necessary to establish:

1. Defendant SHELL OIL initiated a civil proceeding against the plaintiff;
2. The civil proceeding terminated in plaintiff's favor;
3. The defendant acted without probable cause in commencing the civil proceeding;
4. The defendant acted with malice in initiating the civil proceeding;
5. That the civil proceeding so initiated by defendant was a legal cause of damage to plaintiff;
6. The extent and nature of the damages suffered by plaintiff;
7. Nature and extent of punitive or exemplary damages to be awarded to plaintiff, if you find, under these instructions, that defendant SHELL OIL COMPANY was guilty of oppression or malice in the conduct upon which you base your finding of liability.

"Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.

4a

You should consider all of the evidence bearing upon every issue regardless of who produced it.

BAJI 2.60 and 7.32

GIVEN: _____ ✓

GIVEN AS MODIFIED: _____ ✓

REFUSED: _____

REQUESTED BY: _____

/s/ Illegible
JUDGE OF THE SUPERIOR
COURT
